Supreme Court, U.S.
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No. 07-295

In The

Supreme Court of the United States

JEAN FIDES ALEXANDRE,

Petitioner,

vs.

JOHN DUFFY, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the REAL ID Act of 2005, as applied to petitioner, violates the Suspension Clause of the United States Constitution.

TABLE OF CONTENTS

Page

STATEMENT OF QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

THE THIRD CIRCUIT'S OPINION HAS THE EFFECT OF DEPRIVING PETITIONER ALEXANDRE OF JUDICIAL REVIEW BY A NEUTRAL OFFICER OF HIS ELIGIBILITY FOR SECTION 212(c) RELIEF UNDER *ST. CYR* 8

CONCLUSION 9

CIRCUIT OPINIONS ..... App. 1

TRANSFER ORDER OF THE DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ..... App. 3

TABLE OF AUTHORITIES

Page

CASES

Alexandre v. U.S. Atty Gen'l, 452 F.3d 1204 (11th Cir. 2006) 7, 8

INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) ..... *passim*

Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004) ..... *passim*

Rankine v. Reno, 319 F.3d 93 (2d Cir. 2003) 5, 8

STATUTES

8 U.S.C. § 1182(c) ..... *passim*

8 U.S.C. § 1252 ..... 2, 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 2241 1

REGULATIONS

8 CFR § 1003 4

8 CFR § 1212.3 4

OTHER AUTHORITIES

U.S.Const. Article I, § 9, cl. 2 ..... 2, 6

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (April 24, 1996) ("AEDPA") 4

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009 (September 30, 1996) ("IIRIRA") 4

TABLE OF AUTHORITIES – Continued

Page

Immigration Act of 1990, Pub.L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990) ("IMMACT90") 3, 5

REAL ID Act of 2005 (Division B of the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," Pub.L. No. 103-13, Div. B., 119 Stat. 231, 302 (May 11, 2005) ..... *passim*

Florida Statutes § 777.04 2

Florida Statutes § 893-135 2

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jean Fides Alexandre, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in petitioner's case on June 6, 2007.

OPINIONS BELOW

On June 6, 2007, the Court of Appeals entered its non-precedential opinion denying Alexandre's petition for rehearing en banc. This opinion is not published. The petition for rehearing was from a decision dismissing an appeal filed on March 1, 2007. A copy of each order is attached hereto in Appendices "A" and "C." The district court's order outlining the facts and transferring Alexandre's habeas corpus is attached hereto as Appendix "B."

JURISDICTION

On February 14, 2005, petitioner Alexandre filed a habeas corpus petition in the United States District Court for the District of New Jersey (No. 2:05-CV-00864-FSH), which court had subject-matter jurisdiction under 28 U.S.C. § 2241. The district court transferred the petition on September 21, 2005 pursuant to the REAL ID Act.

The Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review a "final order" by the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves (1) the Suspension Clause, U.S.Const. Article I, § 9, cl. 2; (2) the REAL ID Act of 2005 (Division B of the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," Pub.L. No. 103-13, Div. B., 119 Stat. 231, 302 (May 11, 2005)); and that statute's effect on (3) 8 U.S.C. § 1252(a).

STATEMENT OF THE CASE

Factual Background

Jean Fides Alexandre is a native and citizen of Haiti, through birth in Port-au-Prince on November 26, 1967. He entered the United States with his family on August 18, 1978, at age 10, and was admitted as an immigrant.

On November 8, 1988, Alexandre (then age 20) was arrested in Dade County, Florida and charged with trafficking in cocaine. It was policy then in Florida to offer young first offenders like Alexandre a plea agreement that incorporated Florida's youthful offender sentencing scheme. After discussing the plea, the immigration consequences of a conviction, and his eligibility for a waiver of deportation, Alexandre proceeded to trial and was convicted of conspiracy to traffic in cocaine, and cocaine trafficking, in violation of Florida Statutes § 777.04 and § 893-135.

On July 26, 1989, Alexandre was sentenced to a term of 15 years imprisonment. At that time he was statutorily eligible for a 212(c) waiver, having resided in the United

States as a lawful permanent resident for more than seven years.

Based on his conviction, the Immigration & Naturalization Service (INS) started deportation proceedings against Alexandre in September 1994, while he was still imprisoned in Florida. Alexandre applied to the immigration judge for a waiver of "excludability" under then Section 212(c) of the Immigration & Nationality Act (INA).[1] The immigration judge denied the application on November 13, 1995, because by then Alexandre had served more than five years in jail on his sentence. A 1990 amendment to the INA restricted the 212(c) waiver to aliens who had served less than five years in jail when the waiver decision was made.[2]

Alexandre was released from jail after serving less than half his sentence, sometime in 1996, and returned to his family in New York. In March 1996, his deportation order became final.

In August 2004 immigration agents arrested petitioner and he was detained thereafter in New Jersey, pursuant to a warrant of deportation.

On June 28, 2004 the Third Circuit decided *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004). *Ponnapula*,

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[1] Codified at 8 U.S.C. § 1182(c) and repealed in 1996.

[2] *See* Immigration Act of 1990, Pub.L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990) ("IMMACT90"). The 1990 amendment applied to all "admissions [and, by implication, deportations] occurring after the date of the enactment" of the amendment on November 29, 1990. § 511(b), 104 Stat. at 5052. The Attorney General interpreted this to mean that the amendment applies to all applications for discretionary waiver submitted after November 29, 1990. 56 Fed. Reg. 50,033 (Oct. 3, 1991).

interpreting *St. Cyr*,[3] holds that an alien who was offered a plea agreement but rejected it and was convicted at trial (and thereby rendered deportable) nonetheless might have a reliance interest in the continued availability of Section 212(c) relief. (Ponnapula's conviction pre-dated IIRIRA,[4] but he was placed into removal proceedings in 2000.)

Three months after *Ponnapula* was decided, the Justice Department promulgated rules for reopening cases within the *St. Cyr* ambit. The rules amended 8 CFR § 1003 and § 1212.3 to permit reopening of deportation cases for certain criminal aliens who qualified for a Section 212(c) waiver prior to the amendments made by the AEDPA[5] and IIRIRA. Alexandre qualified on all points of 8 CFR § 1003.44 save that he was convicted after a trial, while the regulations limit reopening to those who pleaded guilty.[6] The "special motion" regulations expressly waive the "five years served" bar for those aliens, like Alexandre,

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[3] *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

[4] IIRIRA is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

[5] AEDPA is the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[6] The "final rule" published in the Federal Register rejected the suggestion by commentators that the special *St. Cyr* re-opening rule be expanded to include aliens who went to trial. The commentary noted that the "issue has been heavily litigated in the federal courts" and that "every circuit that has addressed the question has held that an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*." 69 Fed. Reg. 57828, third col., last full para. This rule was published on September 28, 2004, and unaccountably fails to mention *Ponnapula*, which was decided on June 28, 2004, three months before the "every circuit" assertion was published.

who were convicted before November 29, 1990. 8 CFR § 1212.3(f)(4)(ii).[7]

On February 14, 2005 Alexandre filed a habeas corpus petition in the district court in New Jersey challenging his custody. He also filed a "special motion" to reopen his deportation case under the new regulations.

The Board of Immigration Appeals (BIA) denied Alexandre's motion to reopen. In its March 31, 2005 decision, the BIA relied on the "five year" bar to deny reopening for Alexandre, despite the fact that the Attorney General's regulation provided a waiver for the bar. Moreover, although Alexandre was locked up in New Jersey, in the Third Circuit, the BIA nonetheless applied Second Circuit law to deny reopening. The BIA's theory was that if Alexandre's case were ever reopened, it would be assigned to an immigration judge in New York, and thus Second Circuit law would apply.

This distinction is important. Third Circuit precedent holds that an alien who proceeded to trial might still have a reliance interest on the availability of a § 212(c) waiver, as in *Ponnapula*. In contrast, the Second Circuit holds that *St. Cyr* retroactivity applies only to aliens who pleaded guilty; *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003).

In his habeas proceedings, Alexandre argued that he should be accorded a "hearing" (i.e., to adduce evidence) to substantiate his claim that he had a specific reliance on the availability of a Section 212(c) waiver when he made his decision to reject the Florida court's youthful offender

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[7] The Justice Department's decision to waive the five-year bar for pre-1990 convictions is explained at 69 Fed. Reg. 57830-57831.

plea deal. Such a hearing would be necessary to substantiate his claim under *Ponnapula*. The BIA's denial was premised on IMMACT90's "five year" bar, but also deprecated Alexandre's quantum of evidence to support his claim, while not affording Alexandre a hearing in any forum to offer that evidence while he was jailed.

While the petition was pending, Congress passed the REAL ID Act on May 11, 2005. On May 16, 2005 the United States Attorney at Newark moved the district court to transfer the habeas case to the Court of Appeals for the Second Circuit. The government later modified this motion, specifying the Eleventh Circuit as the transferee court, because Alexandre had been in Florida for his deportation case.

In the district court, Alexandre opposed the transfer of his habeas petition as violative of Article I, § 9, cl. 2 of the Constitution, because under the judicial review provisions of the INA, a circuit court cannot afford him a hearing on his claims, nor can the appellate courts permit the adduction of additional evidence which would enable him to prove that the BIA erred as a matter of law in denying reopening. *See* 8 U.S.C. § 1252(a).

Alexandre's theory is that (a) the "cold case review" provisions of 8 U.S.C. § 1252(a), as amended by the REAL ID Act, are not a substitute for habeas corpus, and in his case the abolition of habeas violates the Suspension Clause; and (b) under *St. Cyr*, the reopening regulations waiving the "five year" bar, and *Ponnapula*, he is entitled to be considered for a Section 212(c) waiver.

Petitioner Alexandre is under the supervision of the Homeland Security Department and living and working in New York.

Procedural Background

Petitioner Alexandre, then in "custody" under a warrant of deportation and detained by the immigration authorities in a New Jersey jail, filed a petition for writ of habeas corpus against respondent John Duffy, warden of the Bergen County jail. The petition was filed on February 14, 2005 in the New Jersey District Court, and assigned to the Honorable Faith S. Hochberg.

While the petition was pending, the BIA denied Alexandre's special motion to reopen his deportation case under the *St. Cyr* regulations, even though Alexandre was an immigrant (and 212(c) eligible) when he was convicted in 1989.

Following the passage of the REAL ID Act, the district court in New Jersey transferred the habeas case to the 11th Circuit of Appeals. Alexandre immediately filed an appeal to the Third Circuit (No. 05-4395), challenging the constitutionality of the abolition of habeas under the Suspension Clause.

The parties briefed the case in both the Third and in the 11th Circuits. The 11th Circuit reached the case first, denying relief on April 12, 2006; *Alexandre v. U.S. Atty Gen'l*, 452 F.3d 1204 (11th Cir. 2006). The government then moved the Third Circuit to dismiss Alexandre's appeal as barred by *res judicata*. The panel dismissed the appeal on March 1, 2007, with Judge Ambro dissenting. Alexandre moved for rehearing *en banc* and the Third Circuit denied that motion on June 6, 2007. This petition followed.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT'S OPINION HAS THE EFFECT OF DEPRIVING PETITIONER ALEXANDRE OF JUDICIAL REVIEW BY A NEUTRAL OFFICER OF HIS ELIGIBILITY FOR SECTION 212(c) RELIEF UNDER *ST. CYR*

The Third Circuit's decision not to rehear Alexandre's appeal was based on the narrow ground that Alexandre's claim was *res judicata*, based on the 11th Circuit decision in *Alexandre v. Atty Gen'l*, 452 F.3d 1204 (11th Cir. 2007). The issue in Alexandre's case, as in *St. Cyr*, is the impermissible retroactive application of amendments to the INA after an alien has relied on the INA in effect when he made a trial decision. The BIA denied Alexandre's motion to reopen in part because it applied Second Circuit law, *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), even though Alexandre was in custody in the Third Circuit when he petitioned both for habeas relief and for reopening of his deportation case. The 11th Circuit applied its own law to reject his claims when the habeas was converted to a petition for review, and further rejected Alexandre's challenge to the REAL ID Act by merely reciting that the law abolishing habeas corpus had to be constitutional, because Congress had enacted it. The Third Circuit then declined, on *res judicata* grounds, to hear his case on the merits, despite the fact that Third Circuit precedent would have accorded Alexandre some judicial proceeding on the merits of his claim. *See Ponnapula*, 373 F.3d at 493 ("The holding in *St. Cyr* then is simply not subject to a qualification that the alien seeking the opportunity to pursue § 212(c) relief must have accepted a plea agreement that necessarily preserved his eligibility for § 212(c) relief (i.e., a plea agreement that provided for release from

incarceration in less than five years' time).") The application of 1990 and 1996 amendments to Alexandre's 1989 conviction is on all fours with the mischief that this Court rectified in *St. Cyr*. The result not only works an injustice on a long-term resident, but it deprives him of the process contemplated by the Framers, who thought that habeas corpus was important enough to war ant Constitutional protection in the form of the Suspension Clause.

CONCLUSION

For the foregoing reasons, petitioner submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-4395

JEAN FIDES ALEXANDRE

v.

WARDEN JOHN DUFFY
(D. N.J. Civ. No. 05-CV-00864)

Present: RENDELL, AMBRO AND ROTH, *CIRCUIT JUDGES*

Submitted are:

(1) Respondent-Appellee's Motion to Dismiss;

(2) Appellant's Response to Government's Motion to Dismiss Appeal as Res Judicata;

(3) Amicus Counsel World Organization for Human Rights USA's Opposition to Respondent-Appellee's Motion to Dismiss;

(4) Respondent-Appellee's Reply to Amicus Counsel's Opposition to Motion to Dismiss; in the above-captioned case.

Respectfully,

Clerk

MMW/CAD/arl

ORDER

The foregoing motion to dismiss is granted based on the principles of res judicata and collateral estoppel. *See Alexandre v. Attorney General*, ___ F.3d ___, 2006 WL 1678202 (11th Cir. April 12, 2006). Judge Ambro would have referred this motion to a merits panel.

By the Court,

/s/ Marjorie O. Rendell
Circuit Judge

Dated: March 1, 2007
ARL/cc: SJB; MHS; DJK; PS

APPENDIX B

CLOSED

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEAN FIDES ALEXANDRE,	Hon. Faith S. Hochberg
Petitioner,	Civil No. 05-0864 (FSH)
v.	**ORDER**
JOHN DUFFY,	(Filed Sept. 21, 2005)
Respondent	Date: September 21, 2005

***HOCHBERG, District Judge*:**

This matter coming before the Court upon Petitioner's emergency habeas application for a stay of deportation after the Immigration Judge and the Board of Immigration Appeals found against Petitioner, and the Court granting such stay pending briefing, and the Government having moved for a transfer of this matter to the Court of Appeals for the Eleventh Circuit[1] in accordance with the Real ID Act of 2005, and Petitioner arguing that the Real ID Act is Unconstitutional under Art. I, § 9, cl. 2 of the Constitution (the Suspension Clause) because the Court of Appeals may not make evidentiary findings, and Petitioner also arguing that the Real ID Act does not affect Petitioner's right to habeas review derived (independent of statute) from the

[1] The government initially sought transfer to the Second Circuit but amended its request after realizing its error.

Constitution, and the Court deciding the motion on the papers, and for good cause shown; and

it appearing that any evidentiary findings that the Court of Appeals deems necessary may be acquired by remand to an appropriate forum at the Court of Appeals's discretion; and

it appearing that any existing independent Constitutional right to habeas review is not infringed by requiring district court's to surrender jurisdiction to appellate courts;[2]

IT IS on this 21st day of September 2005,

ORDERED that the Government's motion to transfer pursuant to the Real ID Act to the Court of Appeals for the Eleventh Circuit is **GRANTED**; and it is further,

ORDERED that this Court's stay remains in effect unless vacated by the Court of Appeals; and it is further,

ORDERED that this case is **CLOSED**.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg,
U.S.D.J.

[2] There is clearly no independent Constitutional right to habeas review in the federal *district* courts. Such courts were established by statute pursuant to Article III, which states "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Petitioner provides no relevant citation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4395

JEAN FIDES ALEXANDRE,

Appellant

v.

WARDEN JOHN DUFFY, Bergen County Jail,
160 South River Street, Hackensack, NJ 07601-6925

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 05-cv-00864)
District Judge: Honorable Faith S. Hochberg

Present: SCIRICA, *Chief Judge,* SLOVITER,
McKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, and ROTH,* *Circuit Judges*

SUR PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

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* The vote of the Honorable Jane R. Roth, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

The petition for rehearing filed by Appellant Jean Fides Alexandre having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: June 6, 2007

ARL/cc: SJB; DJK; PS; MHS